ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services	CC Docket 94-54

To: The Commission

REPLY COMMENTS OF NEW PAR

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Dated: July 14, 1995

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SUMMARY

The consensus of commenting parties supports the tentative conclusion that CMRS-to-CMRS interconnection would not serve the public interest. The prudent course of action is to allow interconnection to evolve through the operation of market forces. The Commission, however, should clarify that the Section 208 complaint process is not the proper procedural mechanism for addressing CMRS interconnection requests on a case-by-case basis.

The Commission also should refrain from mandating switch-based cellular resale because the resale industry has failed to demonstrate that such switch-based resale would serve the public interest. First, the so-called "innovative" offerings allegedly facilitated by switch-based resale are primarily administrative in nature. To the extent resellers claim switch-based cellular resale will promote equal access, if that indeed is the case, the Commission will mandate CMRS equal access as a result of its deliberations elsewhere in this proceeding. Finally, Commission policy pronouncements in the "expanded interconnection" and open network architecture proceedings do not support switch-based cellular

resale. Unlike landline local exchange carriers, cellular licensees do not control bottleneck facilities. Further, the cellular reseller-switch proposal results in inefficient and "splintered" unbundling that the Commission has sought to avoid in its ONA proceedings.

The feasibility and public interest benefits of number transferability should be left to the general rulemaking proceeding dedicated to this issue. Neither the Commission nor any of the parties supporting number transferability have proposed specific rules or a technically feasible means for achieving number transferability in the wireless context. The record in this proceeding is thus inadequate to support imposing number transferability as part of the CMRS resale policy.

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To: The Commission

REPLY COMMENTS OF NEW PAR

New Par, by its attorneys, respectfully submits its reply comments in response to the Commission's Second Notice of Proposed Rule Making ("Second NPRM") in the above-captioned proceeding. This Reply primarily addresses the comments regarding whether to mandate CMRS interconnection, switch-based resale, and number portability.[1]

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[1] To the extent the Commission sought comment on other issues not discussed specifically in this Reply, New Par relies on its Comments and the comments of other parties filed June 14, 1995. New Par notes that all parties commenting on the preemption issue supported federal preemption of inconsistent State interconnection requirements and that the overwhelming majority of commenting parties supported imposing a time limit on the obligation to permit resale by competing facilities-based CMRS providers.

I. THE RECORD OVERWHELMINGLY SUPPORTS THE TENTATIVE CONCLUSION THAT CMRS-TO-CMRS INTERCONNECTION IS NOT WARRANTED.

The consensus of commenting parties supports the Commission's tentative conclusion that CMRS-to-CMRS interconnection would *not* serve the public interest. The few parties in favor of mandatory CMRS-to-CMRS interconnection erroneously conclude that the same rationale underlying LEC-to-CMRS interconnection applies equally in the context of CMRS-to-CMRS interconnection.[2] Some parties even mistakenly assert that facilities-based cellular carriers are already obligated to interconnect upon reasonable request from another carrier.[3] Not only is there no such obligation on CMRS carriers now, the policies underlying interconnection obligations imposed on landline LECs do not justify CMRS-to-CMRS interconnection because CMRS providers do not control access to bottleneck facilities.

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[2] See General Communication, Inc. Comments at 2-4; General Services Administration ("GSA") Comments at 3-6.

[3] See General Communication, Inc. Comments at 2; National Wireless Resellers Association ("NWRA") Comments at 4; see also The Southern Company Comments at 2 (advocating deployment of CMRS interconnection on a service-by-service basis).

Neither the Communications Act of 1934, as amended (the "Act"), nor Commission pronouncements, however, impose such an obligation on cellular carriers. As New Par demonstrated in its Comments and as the Commission itself has recognized, neither Sections 201(a) nor 332(c)(1)(B) impose on CMRS providers a duty to provide interconnection.[4] Section 201(a) of the Act states in no uncertain terms that the duty to establish connections with other carriers arises only "in accordance with *orders of the Commission* in cases where the Commission, *after opportunity for hearing*, finds such action necessary or desirable in the public interest . . . ."[5]

In the current deregulatory atmosphere, the prudent course of action -- and the one proposed by the

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[4] See New Par Comments at 6-7, 15-16 (citing Second NPRM ¶¶ 38-39). Indeed, until expressly ordered by the Commission to provide interconnection upon reasonable request, landline LECs likewise were under no obligation to interconnect with another carrier upon request. See, e.g., Cellular Communications Systems, 86 F.C.C.2d 469 (1981), modified, 89 F.C.C.2d 58 (1982), further modified, 90 F.C.C.2d 571 (1982), appeal dismissed sub nom. United States v. FCC, No. 82-1526 (D.C. Cir. 1983); Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

[5] 47 U.S.C. § 201(a) (emphasis added). See also Comcast Cellular Communications Comments at 10-14.

Commission -- is to refrain from imposing mandatory CMRS-to-CMRS interconnection obligations and instead allow interconnection to evolve naturally through the operation of competitive market forces. Indeed, those parties advocating mandatory CMRS-to-CMRS interconnection have failed to offer any explanation as to why they believe interconnection would not develop naturally when the volume of mobile-to-mobile traffic justifies the sunken costs associated with direct connection or how they or consumers would be disadvantaged without it.

II. NEITHER THE PUBLIC INTEREST NOR PRIOR COMMISSION PRONOUNCEMENTS WARRANT IMPOSING ON CELLULAR CARRIERS THE OBLIGATION TO PERMIT SWITCH-BASED RESALE.

A. Resellers Assert the Wrong Public Interest Standard Under Section 201(a).

The National Wireless Resellers Association ("NWRA") concedes that Sections 332(c)(1)(B) and 201(a) do not impose an absolute interconnection obligation on CMRS providers and that interconnection obligations arise only after the Commission finds, after opportunity for hearing, that the public interest would be served by ordering such interconnection.[6] The NWRA, however, has incorrectly asserted that the public interest standard under Section 201(a) is whether the interconnection re-

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[6] See NWRA comments at 2.

quested is privately beneficial without being publicly detrimental.[7] The cases cited by NWRA do not support this proposition.

Specifically, Hush-a-Phone Corp.[8] and the case referred to by the NWRA as AT&T Premises Ruling[9] address the burden of proof placed on monopoly landline carriers when justifying restrictions placed on telephone subscribers' right to attach their customer premises equipment ("CPE") to the public switched telephone network. As the AT&T Premises Ruling makes clear, the initial public interest analysis of whether to order interconnection does not consist merely of whether public detriment

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[7] NWRA Comments at 2; see also Cellular Service, Inc. and ComTech Mobile Telephone Company ("CSI/ComTech") Comments at 10; Telecommunications Resellers Association ("TRA") Comments at 12. The NWRA (formerly, the National Cellular Resellers Association ("NCRA")) and CSI/ComTech made the same erroneous assertion in their Comments filed in response to the Notice of Inquiry in this proceeding. See NCRA Reply Comments, filed Oct. 13, 1994, at 12; CSI/ComTech Comments, filed Sept. 12, 1994, at Exhibit 1, p.7; see also Second NPRM ¶ 78 (noting that CSI/ComTech had argued in favor of this standard in their comments). By failing to give any credence to this argument in the Second NPRM, the Commission appears to have already rejected it. See Second NPRM ¶ 95.

[8] 238 F.2d 266 (D.C. Cir. 1956).

[9] American Tel. & Tel. Co., Restrictions on Interconnection of Private Line Services, 60 F.C.C.2d 939 (1976) [hereinafter AT&T Premises Ruling].

would result.[10] Rather, once the Commission imposed an interconnection obligation, it excepted from this obligation interconnection that would result in pubic detriment consisting of technical or economic harm.[11]

In contrast, the initial public interest analysis under Section 201(a) is much more comprehensive and would include, at minimum, an examination of whether bottleneck facilities are involved and whether the benefits of such interconnection outweigh the costs.[12] As the Commission has recognized, cellular carriers are under no current obligation to permit switch-based resale.[13] Having no existing legal duty, cellular carriers are free to reject reseller-switch "interconnection" requests on the basis of their own business judgment. Thus, contrary

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10 Id. at 942-45. Similarly, in the Resale and Shared Use cases cited by TRA (see TRA Comments at 29-30), the Hush-a-Phone standard was used to determine the reasonableness of tariff restrictions on resale. See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C.2d 167, 171 (1981). The public interest analysis of whether to mandate MTS/WATS resale, however, was much more comprehensive and included, among other things, an examination of marketplace and economic issues. See id. at 170-71, 174-85.

11 See, e.g., AT&T Premises Ruling, 60 F.C.C.2d at 942.

12 See Second NPRM ¶¶ 36, 96.

13 See id. ¶¶ 95-96.

to the NWRA's claim, cellular carriers are not required to demonstrate that the specific interconnection request would cause actual technical harm to the network.

B. Resellers Have Failed To Demonstrate How Switch-Based Resale Will Promote Innovative Service Offerings or Otherwise Serve the Public Interest.

The resale industry claims in a rather conclusory manner that the reseller-switch proposal will facilitate innovative service offerings and lower costs to consumers.[14] Yet, despite ample opportunity to describe such innovative offerings during the course of this proceeding, the so-called "innovative" offerings proposed by the resale industry thus far are primarily administrative in nature (*i.e.*, related to billing). Since the resale industry has failed to support its claim in the record of innovative services offered via the reseller switch, there is no support for the NWRA's claim that the reseller switch would attract additional subscribers and thus ultimately benefit the underlying facilities-based cellular carriers.[15]

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[14] See, e.g., NWRA Comments at 6-7; Time Warner Telecommunications Comments at 9; GSA Comments at 7; Connecticut Telephone and Communications Systems, Inc. Comments at 6; CSI/ComTech Comments at 3.

[15] See NWRA Comments at 17.

The NWRA now, and apparently for the first time, claims that switch-based resale will enable resellers to offer equal access and "1+" dialing even if customer choice of a preferred interexchange carrier ("IXC") is not offered by the underlying facilities-based cellular carrier.[16] The Commission, however, as part of this very proceeding is already considering whether to impose generally an IXC equal access obligation on CMRS providers.[17] If the Commission were to find equal access to be in the public interest, it will directly order all CMRS providers, presumably including resellers, to offer IXC equal access. In any event, many cellular licensees including New Par, already provide customers with a choice of preferred IXC.[18] Cellular resellers who currently offer their customers a particular long distance

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16 See NWRA Comments at 6-7.

17 See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408, 5423, ¶ 30 (1994).

18 Despite no longer being subject to equal access obligations under the Modification of Final Judgment ("MFJ"), New Par continues to honor customer IXC choices made during its adherence to the MFJ's equal access provisions and to offer all new customers the ability to choose from among available IXCs.

service likely would be unwilling to voluntarily offer IXC equal access.

The issue therefore is not simply whether switch-based resale will increase competition and consumer choice, but rather it is whether the Commission should authorize a new class of service providers that lack their own spectrum and independent networks. Recognition of such a new class of carriers would have a depressive effect on the incentives of facilities-based wireless competitors (*i.e.*, those entities that have devoted significant resources or capital to build their own networks or those who have acquired their own spectrum through the auction process).

C. The Policies Underlying Expanded Interconnection and Open Network Architecture Do Not Support the Splintered Unbundling Required Under the Cellular Reseller-Switch Proposal.

Although the resale industry cites the "expanded interconnection" and open network architecture ("ONA") proceedings in support of switch-based cellular resale,[19] the fragmented or splintered unbundling requested by resellers is not supported by Commission policy pronouncements in either proceeding. The unbundling and

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[19] See TRA Comments at 26-28, 30-31; Time Warner Telecommunications Comments at 19 n.37.

interconnection required under expanded interconnection and ONA were imposed only on the largest classes of LECs and the Bell Operating Companies ("BOCs") primarily due to their monopoly control over bottleneck facilities.[20] CMRS licensees simply do not possess any such monopoly status.

In the expanded interconnection proceedings, the Commission addressed the unbundling of switching and transport services and ultimately required Tier 1 LECs to allow other parties (*i.e.*, competitive access providers ("CAPs") and IXCs) to connect their trunks to LEC switches through virtual collocation. Although CAPs and IXCs have their own networks and trunk lines, the LECs historically had allowed CAPs and IXCs to purchase required switching services only as part of a bundled package of switching and transmission segments. The Commission therefore required these LECs to unbundle switching and transport in order to enable LEC competitors to offer their own transmission segments in place of the transmis-

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[20] See, e.g., Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, CC Docket No. 91-141, 9 FCC Rcd 5154, 5184 (1994).

sion segments that the LECs traditionally had bundled with their switching functions.[21]

The policies underlying expanded interconnection, however, do not translate to switch-based cellular resale. CAPs and IXCs have their own network transmission facilities that are independent of the LEC's network. The exchange services offered by CAPs via their independent network facilities are complete substitutes for the exchange services provided via LEC networks. CAPs and IXCs need the LEC interconnection only so they can access (through the LEC's local switches) the LEC's local subscribers. Cellular resellers, in contrast, do not have their own transmission networks, thus they purchase cellular transmission services from facilities-based cellular carriers. Further, unlike CAPs and IXCs, any services provided by switch-based cellular resellers are technologically limited by the services that the underlying cellular carrier offers to the public on a nondiscriminatory basis via its cellular transmission network. The policy goals promoted by expanded intercon-

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[21] See id. at 5156; see also Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141 Transport Phase I, 8 FCC Rcd 7374 (1993) (switched transport expanded interconnection).

nection simply could not be achieved through "interconnection" of the cellular reseller switch.

Similarly, the rationale underlying ONA does not warrant switch-based cellular resale. The Commission required ONA as a condition of AT&T and the BOCs being able to provide enhanced services on an unseparated basis.[22] Unbundling under ONA was ordered primarily for two reasons: (1) to deter against discrimination by the BOCs in favor of their own enhanced service operations; and (2) to give competing enhanced service providers ("ESPs") the opportunity to design offerings that utilized landline network services in a flexible and economical manner.[23] These policies are not applicable here. Section 202(a) of the Act and Section 22.901(e) of the Commission's rules already afford cellular resellers nondiscriminatory treatment vis-a-vis other users.

Although the resale industry characterizes its proposal as "interconnection," the proposal might be more

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[22] See Third Computer Inquiry, 104 F.C.C.2d 958, 964 (1986); see also Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket 95-20 (released Feb. 21, 1995), ¶¶ 3-7. The Commission previously had permitted the integrated Bell System (and subsequently the BOCs following divestiture) to provide enhanced services only through structurally separate subsidiaries.

[23] See Third Computer Inquiry, 104 F.C.C.2d at 1064.

aptly characterized as a hybrid request for interconnection and unbundled services, similar to that required as part of ONA.[24] Unlike the BOCs, however, cellular carriers do not control access to bottleneck facilities. Furthermore, unlike enhanced services in which the unbundled basic service elements are building blocks to value-added data processing services ultimately offered to the customer, resellers simply reoffer cellular service to the public and add little, if any, functionality other than additional administrative offerings and perhaps equal access.[25]

In addition, in ordering ONA the Commission expressly recognized that inefficiencies can occur from "unnecessarily unbundled or splintered services" and indicated that it was not mandating an unlimited degree of unbundling.[26] Indeed, in a subsequent order in the same docket, the Commission clarified that, by mandating ONA, it contemplated unbundling of basic services, not

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[24] The Commission itself has even characterized switched-based resale as a combination of unbundling and interconnection. See Second NPRM ¶ 96.

[25] See NWRA Comments at 6-7.

[26] Third Computer Inquiry, 104 F.C.C.2d at 1065 (citing AT&T Communications Revisions to Tariff FCC Nos. 1, 9, and 10, 103 F.C.C.2d 157, 162 (1985)).

substitution of underlying facilities, and thus the Commission refused to order further unbundling.[27]

Due to the technical characteristics of cellular (in particular, cellular resale), the level of unbundling requested by resellers would not result in an efficient and economical utilization of the cellular network. Specifically, resellers do not want the underlying cellular carriers simply to unbundle switching from transmission, as was required of the LECs in the expanded interconnection proceedings discussed above. Instead, resellers would still purchase cellular licensees' local transmission services, but would want to purchase only limited MTSO switching functions. These specific switching functions, however, cannot be neatly carved out from the cellular transmission service because the MTSO of the underlying cellular licensee still must validate and track all calls originating or terminating on its mobile system. This fragmented or splintered unbundling would thus result in unnecessary redundancy and inefficiency because the reseller would be performing services that the facilities-based cellular licensee must continue to

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[27] See Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, ¶¶ 69-72 (1988).

perform in order to supply the reseller with cellular service to reoffer to the public.[28] The cellular reseller-switch proposal results in exactly the type of inefficient "splintered" unbundling that the Commission has sought to avoid in the ONA docket.

III. THE SECTION 208 PROCESS IS NOT THE PROPER PROCEDURAL MECHANISM FOR IMPOSING PROSPECTIVE INTERCONNECTION OBLIGATIONS ON CMRS PROVIDERS.

Several commenting parties seem to suggest that the Section 208 process may be the proper mechanism for resolving interconnection requests.[29] As New Par demonstrated in its Comments, this is not the case. Unlike requests for declaratory rulings, the Section 208 formal complaint process is not merely prospective in nature. Carriers against whom a Section 208 formal complaint is filed face the risk of monetary damages and, perhaps even more far-reaching, a permanent record at the Commission of conduct in violation of the Act and/or Commission rules. Under Section 201, however, there can be no such

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[28] The only functions that the underlying cellular licensee could refrain from performing is the routing to the LEC or IXC of those mobile-to-land calls made by the reseller's customers.

[29] NWRA Comments at 16; American Mobile Telecommunications Association, Inc. Comments at 4-5; Southwestern Bell Mobile Systems, Inc. Comments at 8-10; Vanguard Cellular Systems, Inc. Comments at 5.

violation for failure to provide interconnection *unless and until* there is a preexisting Commission order requiring the carrier to do so. Accordingly, the Section 208 complaint process is the proper procedural mechanism for addressing interconnection disputes *only* if a carrier flouts a preexisting duty to provide the requested interconnection.[30] Even CSI and ComTech, who initially advanced the reseller-switch proposal, recognize that a Section 208 formal complaint does not lie where the Commission has not yet imposed an interconnection duty.[31]

If, despite precedent to the contrary, the Commission ultimately concludes that the Section 208 complaint process is appropriate for addressing CMRS-to-CMRS interconnection requests on a case-by-case basis, it must clarify that monetary damages and a finding of a

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[30] See, e.g., ITT World Communications, Inc., 87 F.C.C.2d 624 (1981) (Commission on reconsideration denying interconnection complaints and finding no violation of the Act because Western Union had no preexisting legal obligation to provide interconnection). Accord The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2916, ¶ 56 (1987), aff'd, 4 FCC Rcd 2369 (1989) (providing that, because LECs were ordered to provide interconnection to cellular carriers upon reasonable request, cellular carriers unable to obtain an interconnection agreement may file a complaint pursuant to Section 208 of the Act); Second NPRM ¶ 40.

[31] See CSI/ComTech Comments at 8.

rules or Act violation would not be available.[32] Anything less would be an endorsement of retroactive penalties for conduct that was perfectly lawful when undertaken.

IV. THE RECORD IS TOO SPARSE FOR THE COMMISSION TO IMPOSE NUMBER TRANSFERABILITY AS PART OF ITS CMRS RESALE POLICY.

The Commission requested comment on whether number transferability should be mandated as part of its CMRS resale policy.[33] Neither the Commission nor any of the parties commenting in favor of number transferability have proposed any specific rules governing the implementation of a "portability" scheme. Nor have any of the commenting parties proposed a technically feasible and spectrally efficient means of achieving number transferability in the wireless context.[34] For instance, the record contains no discussion regarding whether number transferability would make wireless service more costly

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32 For example, the Commission under ONA has instructed ESPs to file a petition for declaratory ruling -- not a Section 208 complaint -- if they find a BOC's response to a request for specific unbundled basic service elements unsatisfactory. See Filing and Review of Open Network Architecture Plans, 6 FCC Rcd 7646, ¶ 11 (1992)

33 See Second NPRM ¶ 94 & n.192.

34 See generally NWRA Comments; Cellnet Communications, Inc. Comments; Cellnet of Ohio, Inc. Comments; American Tel Group Comments; Andrew M. Molasky Comments.

and complicated due to the fact that cellular licensees, unlike landline carriers, must constantly track and validate calls from transient users. Because the record in this proceeding is thus far devoid of any support for the technical feasibility of number transferability, it would be arbitrary and capricious for the Commission to adopt regulations mandating number transferability as part of its cellular resale policy.[35] Accordingly, the public interest benefits, if any, and technical feasibility of number transferability should be addressed in the general rulemaking proceeding dedicated solely to this issue.[36]

CONCLUSION

For the foregoing reasons, New Par recommends that the Commission proceed with its tentative conclusions to refrain from mandating CMRS-to-CMRS interconnection and switch-based resale. In addition, New Par maintains that the record in this proceeding is inadequate to impose number transferability as part of cellular resale. Number transferability would be more

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35 See 5 U.S.C. § 706(2)(A); see also National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (agency decision through rulemaking must have rational basis in the record).

36 See FCC News Release "Commission Seeks Comment on Telephone Number Portability," CC Docket No. 95-116, RM-8535 (released July 13, 1995).

properly addressed as part of the general rulemaking proceeding dedicated solely to that issue.

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Certificate of Service

I, Tracey M. DeVaux, do hereby certify that on this 14th day of July, 1995, a copy of the foregoing Reply Comments of New Par was served via first-class mail, postage pre-paid to the following:

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